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No. 93-1535

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

WEST PENN POWER COMPANY,
ARMCO ADVANCED MATERIALS COMPANY
and ALLEGHENY LUDLUM CORPORATION,
Petitioners,

v.

PENNSYLVANIA PUBLIC UTILITY COMMISSION and
MON VALLEY ENERGY CORPORATION,
Respondents.

On Petition for a Writ of Certiorari to the Commonwealth Court of Pennsylvania

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RESPONDENT MON VALLEY ENERGY CORPORATION'S SUPPLEMENTAL BRIEF IN OPPOSITION TO BRIEFS OF AMICI CURIAE

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1. Edison Electric Institute ("EEI"), Metropolitan Edison Company and Pennsylvania Electric Company ("MetEd/Penelec") filed Motions for Leave to File Briefs Amici Curiae and Briefs Amici Curiae with the Court on May 20, 1994. Respondent Mon Valley Energy Corporation ("Mon Valley") did not consent to the filing of the Briefs Amici Curiae.

2. Although Mon Valley opposes consideration of the Briefs Amici Curiae, it is compelled to advise this Court of certain significant factual misstatements presented in those Briefs.

3. EEI and MetEd/Penelec assert that the Pennsylvania Public Utility Commission's ("PUC") use of the execution date of the Electric Energy Purchase Agreement ("EEPA") between Mon Valley and West Penn Power Company ("West Penn") to establish a "legally enforceable obligation" and mark the date to determine West Penn's avoided costs was in error and was somehow in grave conflict with the Public Utility Regulatory Policies Act of 1978, 16 U.S.C. § 824a-3 ("PURPA"). EEI and MetEd/Penelec premise their arguments on an assertion that the Mon Valley EEPA has "expired" causing the legally enforceable obligation to lapse. (EEI Brief at 5; MetEd/Penelec Brief at 8). This representation is factually inaccurate and distorts the record.

4. Prior to the evidentiary hearing conducted by the PUC concerning the modifications to the EEPA, which were necessitated by the unforeseeable litigation delays related to the administrative review process, the PUC issued two orders staying the milestone dates contained in the EEPA. Appendices P and Q. The PUC stayed the milestone dates so that the project was not "unfairly terminated, particularly when, as here, circumstances wholly beyond the control of the project have operated to cause unexpected delay." (307a).

5. Following the evidentiary hearing, the PUC extended the remaining milestone dates. Appendix T. The Commonwealth Court affirmed the PUC's grant of a stay and its extension of the milestone dates. Appendix C. As the PUC and the Commonwealth Court recognized, allowing the agreement to expire during the course of litigation related to an unexpectedly prolonged administrative review process is contrary to the purposes of PURPA. Even the dissenting opinion in the Common-

wealth Court recognized that the PUC necessarily has the authority to extend milestone dates if necessitated by litigation delay "to prevent it [the agreement] from lapsing under its own terms." (31a).

6. EEI also argues that West Penn was not provided the opportunity to present evidence relating to its current avoided costs in the course of the hearing relating to Mon Valley's request for modification of the EEPA. (EEI Brief at 12). It fails to recognize, however, that consideration of avoided costs was beyond the Commission's jurisdiction in the modification proceeding and that no party introduced evidence relating to avoided costs. See, Appendix R (312a). The Commonwealth Court, in affirming the PUC's order, recognized that the determination of avoided costs was related to *Shannopin I* (Appendix L), which at the time, was subject to a petition for allowance of appeal pending before the Pennsylvania Supreme Court. After the Pennsylvania Supreme Court declined to review the case (Appendix O), the calculation of avoided costs was remanded to the PUC. In fact, the proceeding involving the calculation of the rate for the project is ongoing. Appendix Y.

7. EEI's assertion concerning Petitioners' inability to present evidence concerning avoided costs further highlights the unworkable and impractical nature of Petitioners' position that if the PUC orders any modification to an EEPA, the benchmark for avoided costs is the date of the final order. At no time during this proceeding did the Petitioners offer or attempt to offer evidence of avoided costs determined as of January 14, 1992, the date of the PUC's final order. (396a). Of course, no party could have presented such testimony at the evidentiary hearing, which was conducted one year earlier. (323a).

8. The PUC's use of the EEPA execution date to serve as the benchmark for the determination of West Penn's avoided costs was logical and consistent with PURPA's application by state agencies.

9. No issue thus exists that warrants this Court's review.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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